

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHAEL JAMES,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DISM-03-0023

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and BUSSE NUTLEY, Member. The hearing was held in the Hearings Conference Room at the Western State Hospital in Steilacoom, Washington, on March 4 and 5, 2004.

1.2 **Appearances.** Appellant Michael James was present and was represented by Christopher Coker, Attorney at Law, of Parr, Younglove, Lyman & Coker, P.L.L.C. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, malfeasance, gross misconduct, and willful violation of the published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant left the institution with a bag of state-purchased food without authorization.

II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on February 26, 2003.

2.2 Appellant began his employment at Western State Hospital on July 5, 1985 as a Hospital Attendant. Appellant subsequently worked as a Mental Health Technician, a Psychiatric Security Attendant, and a Warehouse Worker 1.

2.3 At the time of his dismissal, Appellant was a Warehouse Worker 1 and was responsible for receiving, checking, stowing, taking inventory, and issuing food, equipment, and supplies to the hospital's main kitchen and wards. Appellant has no history of prior formal disciplinary action.

2.4 The Department of Social and Health Services Administrative Policy No. 6.04, Standards of Ethical Conduct for Employees, states that employees are to perform their duties in a manner that promotes public trust by demonstrating the highest standard of personal integrity, fairness, honesty, and compliance with laws, rules, regulations, and department policies. The policy further directs employees to promote an environment free from fraud, abuse of authority, and misuse of public property.

2.5 Western State Hospital's Policy No. 3.4.1, Employee Meals at Hospital, states that food and nutritional service employees are entitled to one meal per shift at no cost to the employee.

1 2.6 By signature dated February 4, 1986, Appellant indicated he received copies of Department
2 of Social and Health Services and Western State Hospital policies, and understood that it was his
3 responsibility to read and understand the contents.

4
5 2.7 By letter dated February 20, 2003, C. Jan Gregg, Chief Executive Officer, informed
6 Appellant of his dismissal effective March 7, 2003. Ms. Gregg charged Appellant with neglect of
7 duty, malfeasance, gross misconduct, and willful violation of the published employing agency or
8 Department of Personnel rules or regulations. Respondent alleged that Appellant left the institution
9 with a bag of state-purchased food without authorization.

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11 2.8 Appellant testified that during his first day in his Warehouse Worker position, his
12 supervisor, John Broullett, told him he was entitled to one meal during his work shift. This was a
13 standard practice at Western State Hospital, which Appellant participated in along with other
14 employees. For his entitled meal, Appellant openly and consistently ate apples and drank Resource
15 Plus (a dietary nutritional supplement drink).

16
17 2.9 Tim Feist, Warehouse Supervisor, was Appellant's supervisor at the time of his dismissal.
18 Mr. Feist testified that Gary Lyons, Dietary Services Manager, saw Appellant drinking Resource
19 Plus and requested that Mr. Feist speak to Appellant. Due to the fact that Resource Plus is a dietary
20 supplement intended to aid in weight gain for underweight patients, Mr. Feist told Appellant to stop
21 drinking the Resource Plus. However, Mr. Feist could not remember when this discussion occurred
22 nor did he document it in writing.

23
24 2.10 Lydia Hall and Shawn Jones, Appellant's co-workers, testified that staff members were not
25 prohibited from drinking Resource Plus, and they both occasionally observed various staff members
26 drinking it. Ms. Hall and Ms. Jones frequently ate lunch with Appellant and observed him drinking

1 Resource Plus in full view of Mr. Feist and Mr. Lyons, at times even while talking to them, with no
2 resulting consequences.

3
4 2.11 Mr. Feist testified that employees were expected to get their entitled meals from the food in
5 the cafeteria warmers as offered on the day's menu. However, he also testified that he saw other
6 employees eat apples and did not speak to them about it even though the apples were not on the
7 menu for the day. Further, Ms. Hall and Ms. Jones testified that it was common for employees to
8 eat food not on the day's menu.

9
10 2.12 Mr. Feist, Ms. Hall, and Ms. Jones testified that employees occasionally took their entitled
11 meal home with them at the end of their shift.

12
13 2.13 Around lunchtime on December 16, 2002, a delivery truck arrived at the warehouse. As was
14 customary when trucks arrived during that time of the day, Mr. Feist asked Appellant to work
15 through his lunch hour in order to unload the truck with his co-workers.

16
17 2.14 Due to the time required to unload the delivery trucks that day, Appellant did not take a
18 lunch break. At the end of his work shift, he packed a bag with approximately seven apples and six
19 boxes of Resource Plus. Mr. Feist noticed a bag of food by the back door, and notified Mr. Lyons
20 because the hospital had been experiencing a problem with stolen food.

21
22 2.15 Mr. Lyons went to the Security Office to report the bag of food. As he was leaving the
23 security building, he saw Appellant walking through the parking lot toward his car with the bag in
24 his hand.

1 2.16 As soon as Appellant got in his car, he began to drink a Resource Plus and was stopped by
2 Eugene Jones, Security Guard. Appellant admitted he took the food and gave the bag to Mr. Jones.
3 Mr. Jones contacted the Lakewood Police Department, and an officer was sent to take statements
4 from all participants in the incident.

5
6 2.17 On December 19, 2002, Mr. Lyons conducted a fact-finding meeting with Appellant, Lynne
7 Glad, Human Resource Manager, and Appellant's representative. Appellant claimed he had worked
8 though his lunch hour, and the bag of food contained his entitled noon meal for the day. Appellant
9 also reported that he drank Resource Plus frequently.

10
11 2.18 Mr. Michael Smith, Chief Operating Officer, recommended to Ms. Gregg that Appellant be
12 dismissed. Mr. Smith's recommendation was based on Appellant's admission that he took the food
13 even though he was aware that food had recently been stolen from the hospital. Mr. Smith also
14 considered that Appellant concealed the food in a bag and claimed it was his noon meal even
15 though his work shift was over for the day. Mr. Smith was not convinced by Appellant's claim that
16 he took the food as his entitled lunch, because the amount he took was well in excess of what could
17 be considered one meal. Further, Mr. Smith considered that Resource Plus is not a meal product,
18 but rather a dietary supplement ordered by physicians at Western State Hospital for patients needing
19 additional nourishment. Mr. Smith determined that Appellant had breached his position of trust as a
20 Warehouse Worker responsible to secure, protect, and account for food products purchased by the
21 hospital.

22
23 2.19 By letter dated February 20, 2003, Ms. Gregg informed Appellant of his dismissal effective
24 March 7, 2003.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant admitted to taking the food for his personal use without authorization from his supervisor. Respondent asserts Resource Plus is a dietary supplement ordered by physicians for patients with nutritional needs and not an appropriate food for employee consumption. Respondent contends that even though Appellant was entitled to a meal, the amount of food he took in the bag was clearly more than what could be considered one meal. Respondent argues that Appellant was only entitled to food that was included in the hospital's daily menu. Respondent asserts Appellant should have consumed his entitled meal in the kitchen area rather than taking the food home for consumption at a later time. Respondent contends that Appellant's job duties included protecting state inventories from loss due to theft or accounting errors.

3.2 Appellant argues he worked through his lunch that day, and he followed the customary practice of getting his entitled meal at the end of his work shift. Appellant asserts that apples and Resource Plus are what he would have eaten for lunch. Appellant contends it was historically accepted for employees to drink Resource Plus and to choose food that was not included in the hospital's daily menu. Appellant argues that Mr. Feist did not direct him to stop drinking Resource Plus, and had Mr. Feist done so, he would have complied with such a directive. Appellant asserts he openly and consistently drank Resource Plus. Appellant contends that during his more than 15 years of employment with Western State Hospital, he had a good employment record and no history of corrective or disciplinary action.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

1 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
2 the charges upon which the action was initiated by proving by a preponderance of the credible
3 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
4 sanction was appropriate under the facts and circumstances. WAC 358-30-170; [WAC 251-12-
5 240(1)]; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

6
7 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
8 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
9 of Social & Health Services, PAB No. D86-119 (1987).

10
11 4.4 Respondent has failed to meet its burden of proof that Appellant's actions rose to the level
12 of neglect of duty. Appellant met his responsibilities and duties as a Warehouse Worker to receive,
13 check, store, inventory, and issue food, equipment, and supplies to the hospital's main kitchen and
14 wards.

15
16 4.5 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to
17 do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with
18 the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-
19 135 (1995).

20
21 4.6 Respondent has failed to meet its burden of proof that Appellant's actions rose to the level
22 of malfeasance by engaging in an unlawful act or doing what he ought not to do, nor did his actions
23 interfere with the performance of his duties.

24
25 4.7 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
26 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant

1 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
2 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

3
4 4.8 Respondent has failed to meet its burden of proof that Appellant's actions rose to the level
5 of gross misconduct. Respondent failed to establish that Appellant's action of taking the bag of
6 food adversely impacted Western State Hospital's ability to carry out its functions; therefore, the
7 charge of gross misconduct is not sustained.

8
9 4.9 Willful violation of published employing agency or institution or Personnel Resources
10 Board rules or regulations is established by facts showing the existence and publication of the rules
11 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
12 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

13
14 4.10 Respondent has met its burden of proving that Appellant willfully violated the Department
15 of Social and Health Services Administrative Policy No. 6.04, Standards of Ethical Conduct for
16 Employees. Appellant was entitled to a meal; however, he took an amount of food that was well in
17 excess of what could be considered one meal.

18
19 4.11 Respondent has failed to prove that Appellant violated Western State Hospital's Policy No.
20 3.4.1, Employee Meals at Hospitals. The policy states that employees are entitled to one meal per
21 shift at no cost to the employee. The policy does not define what specific foods the employees are
22 entitled to, where the food should be eaten, or during what portion of the work shift the meal should
23 be obtained or eaten.

24
25 4.12 In determining whether a sanction imposed is appropriate, consideration must be given to
26 the facts and circumstances, including the seriousness and circumstances of the offenses. The

1 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
2 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
3 program. An action does not necessarily fail if one cause is not sustained unless the entire action
4 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

5
6 4.13 Western State Hospital's Policy No. 3.4.1, Employee Meals at Hospitals, does not clearly
7 define what is acceptable and unacceptable regarding the entitled meals for employees. The amount
8 of apples and Resource Plus that Appellant took as his entitled meal is not condoned by the Board.
9 However, we must consider that Appellant has no history of corrective or disciplinary action in 15
10 years of state service. Further, when considering Respondent's failure to meet its burden of proof
11 on three of the four charges, we cannot conclude that dismissal is the appropriate sanction. In light
12 of the circumstances, we find that dismissal is too severe and the disciplinary sanction of dismissal
13 should be modified to a one-year suspension without pay.

14
15 **V. ORDER**

16 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael James is granted in
17 part and is modified to a one-year suspension without pay.

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19 DATED this _____ day of _____, 2004.

20
21 WASHINGTON STATE PERSONNEL APPEALS BOARD

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23 _____
24 Walter T. Hubbard, Chair
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Busse Nutley, Member